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Supreme Court of the United States

OCTOBER TERM, 1988

SUKETU H. NANAVATI, M.D.,

Petitioner,

v.

BURDETTE TOMLIN MEMORIAL HOSPITAL and EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF THE BURDETTE TOMLIN MEMORIAL HOSPITAL,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION

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REPLY BRIEF IN SUPPORT OF THE PETITION

In the opening sentence of their Brief in Opposition for Respondents ("Resp.Br."), Burdette Tomlin[1] and the Committee proclaim that "[t]he removal of Dr. Nanavati from the Medical Staff . . . came as the result of fifteen separate charges and specifications focused, principally, upon his disruptiveness." Resp.Br., pp. 1-2. This statement is utterly disin-

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1. The defined terms and citation forms in the Petition for Writ of Certiorari ("Petition") are used in the same fashion herein.

genuous in light of the final and conclusive findings of the state courts of New Jersey—to which Respondents stipulated at trial—that the decision "to terminate Dr. Nanavati's staff privileges was not the result of a deliberative process." 5000a. Indeed, the New Jersey Supreme Court affirmed the finding that "Dr. Nanavati has never had a fair hearing [at the Hospital] on the revocation of his privileges." *Nanavati v. Burdette Tomlin Memorial Hospital*, 107 N.J. 240, 526 A.2d 697, 700 (1987). That court pointed out that "a doctor should not be cut off from staff membership merely because he or she has criticized hospital practices and other doctors." *Id.*, 526 A.2d at 703-04. And the court below concluded that "Nanavati's interpretation of events contributes to a robust debate on matters of public importance, namely the competence of medical care at a hospital." *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 108 (3d Cir. 1988), A-19.

In late 1988, the Hospital and Committee finally abandoned all charges first lodged in 1982. The Hospital even stipulated to a permanent state court injunction barring it "[f]rom revoking, suspending or restraining the plaintiff, Suketu H. Nanavati, M.D., from full staff privileges . . . ." A-107.

The balance of the Brief in Opposition is no more faithful to the facts, the law, or the policies which inform, and in this case, militate strongly in favor of the granting of the writ. In this Reply Brief, Petitioner explains why Respondents' arguments against granting the writ are insubstantial.

1. The District Court's Exercise of Discretion in Permitting Nanavati's Antitrust Claims against Respondents is Not Encompassed within the Petition, was Not Decided by the Court below, and Should Not be Addressed by the Court.

Respondents attempt to raise a new issue not encompassed within the Petition as their first and, presumably, strongest argument in opposition to the Petition. They claim

the trial court abused its discretion in permitting amendment of the complaint and final pretrial order.[2]

The Third Circuit has expressly not decided this issue. 857 F.2d at 115 n. 19, A-33. Should the Court grant the Writ and ultimately reverse, it will be time enough for the Third Circuit then to address Respondents' abuse of discretion argument.

The essential fact, therefore, is that Respondents' argument is irrelevant to the Petition and the issues now before the Court. The Court has explained why this is so:

> We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed, and we think this would be a poor case in which to depart from that practice.

J. Truett Payne Co. v. Chrysler Motor Corp., 451 U.S. 557, 568 (1981).

2. The Writ Should be Granted to Rectify the Decision below, which Conflicts with this Court's Decision in *American Society of Mechanical Engineers v. Hydrolevel Corp.*

Respondents' arguments actually highlight why the Petition should be granted. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982), the Court imposed civil antitrust liability upon a nonprofit corporation based upon the actions of its agents, while the court below failed to do so.[3]

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2. The trial court, intimately familiar with the entire course of the pretrial and trial litigation, expressly found that there was no substantial prejudice to Respondents by allowing the amendment. 251a. This is particularly so since they were expressly permitted, as a condition thereof, to recall any witnesses they chose, with costs thereof imposed upon Petitioner. *Id.* That finding is not clearly erroneous but in fact quite accurate in light of the proceedings known first-hand by the trial judge. Contrary to Respondents' contention, therefore, there was no "bad faith" (Resp.Br. 9) by Nanavati found either by the trial court or the court below.

3. Respondents seem to suggest this topic was not raised in the Third

Respondents argue that there is no proof that the Hospital had any "anticompetitive or economic based motivation to conspire with anyone." Resp.Br., p. 13. That is factually inaccurate in light of the many years the Hospital pursued a bad faith vendetta against Nanavati and in light of BTMH's unreasonable contract with Komansky. More important for present purposes, however, Respondents' argument conflicts with *Mechanical Engineers*. There was no suggestion by the Court in that case that the society had any anticompetitive motivation or that its economic intent was in any way germane. This is true because the issue was one of imputing to the corporation the conspiratorial acts of its agents. The opinion below thus conflicts with the rationale of this Court's decision and accords to our country's health care industry a precedent incompatible with our national commitment to free and open—but fair—competition. This is an appropriate circumstance for granting the Writ.

Respondents also seem to argue that the jury's finding of a conspiracy fails because there is no evidence of two or more economic entities. Resp.Br., p. 13-14. They argue further, relying upon a quotation from *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596-97 (1986), that "there must be some degree of 'economic sense' motivating the involvement of the participants." Resp.Br., p. 14. Yet, even the Third Circuit acknowledged that there was evidence of a "referrals boycott" by physicians on the staff. 857 F.2d at 119, A-41. The only issue, then, is whether either or both of the Respondents were linked to that conspiracy.[4]

Moreover, Respondents' quotation from *Matsushita* rein-

Circuit. Resp.Br., 12 n. 8. That is incorrect. For example, Nanavati's Brief below, after reviewing the evidence linking the Emergency Room personnel to the independent physicians' boycott, concluded (p. 17): "Since the ER was operated under contract for the Hospital, the boycott directly implicated BTMH as well as the individual physicians."

4. A careful reading of the Third Circuit opinion shows that it never directly addressed the linkage of the conspiracy to the Hospital, but only to the Committee. See 857 F.2d at 118-120, A-40—A-44 (Heading 2: "Boycott of Referrals by *the Executive Committee or Its Members*.")

forces the need for review here to reinstate the jury's verdict. The quoted passage (Resp.Br., p. 15) merely precludes an inference of conspiracy where there is "no rational economic motive to conspire" and where the defendant's conduct is also "consistent with other equally plausible explanations." 475 U.S. at 596. Yet, Respondents cannot and thus never have attempted to show that the failure of Hospital employees and agents to refer emergency cardiac patients from the ER to Dr. Nanavati—including his own patients—had *any* plausible explanation other than to join in the agreement by many physicians to limit, as Dr. Splitter testified, referrals by Indian doctors from the ER to the Hospital's intensive care unit. 4071a. (As the only Indian cardiologist, Nanavati was plainly the target of this boycott of the type of ER referrals to the ICU likely to occur in heart attack cases.) And as to a "rational economic motive to conspire," the ER physicians "and nurses . . . were in fear that if [they] suggested Dr. Nanavati to the patients, over other doctors, [they] would lose [their] job." A-115. Indeed, the Hospital administration "was terrorizing them" in its effort to enforce the boycott. A-114.

Respondents' various arguments are thus extraneous to whether certiorari should be granted. On examination of the merits, the arguments collapse.[5] But in any event, they are irrelevant to the question presented for review or the factors to be considered by the Court at this stage. The Petition should therefore be granted to correct the failure by the Third Circuit to impute to the Hospital the actions of BTMH's personnel in furtherance of the overall conspiracy. The Court can then "resolve the apparent conflict between the Court of Appeals holding and the reasoning underlying this Court's hold-

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5. For example, Respondents inaccurately suggest that the boycott theory was also defective because of a "failure to prove product or geographic market." Resp.Br. 15 n.10. The trial court, however, had ample evidence on this issue and instructed the jury that the relevant market is the provision of cardiological care in Cape May County. 4400a. Respondents did not object to this instruction or otherwise assert this "market" issue in the trial court. They thus waived it, a conclusion reinforced by Fed.R.Civ.P. 49(a), 50(a) and (b), and 51.

ing in [*Mechanical Engineers*]." *United States v. Doe*, 465 U.S. 605, 610 (1984). *Mechanical Engineers* and the good "health" of our deregulated health care system require this result. See *Patrick v. Burget*, 486 U.S. —, 100 L.Ed.2d 83, 108 S.Ct. 1658 (1988).

3. The Fragmenting of an Antitrust Plaintiff's Proof, as Evidenced in the Opinion below, Conflicts with this Court's Decision in *Continental Ore Co. v. Union Carbide Corp.* and Threatens the Continued Viability of Congress's Intention to Foster Private Enforcement of the Sherman Act.

In resisting the Petition as to Question 2 therein, Respondents again misstate the record or otherwise resort to legally insignificant matter. First, Respondents argue that the Komansky contract was not submitted to the jury as a Section 1 violation, but only as a racial discrimination claim. Resp.Br. p. 16. This statement ignores the verdict questions and jury instructions, to which Respondents did not object, that allowed the jury to find a "*contract*, combination, *or* conspiracy in restraint of interstate commerce." 857 F.2d at 115, A-34 (Special Verdict question B1; emphasis supplied). The evidence disclosed only one contract—the Komansky contract—to which the jury charge and verdict question could relate. It is no wonder, then, that the district court understood that "Nanavati relies heavily" upon the Komansky contract for § 1 liability. *Nanavati v. Burdette Tomlin Memorial Hospital*, 645 F. Supp. at 1233; A-77; Petition, pp. 14-15. But, perhaps the clearest evidence that Respondents have again misstated the record[6] is the closing argument by Nanavati's counsel, which eliminates any question on this point:

So in February of '83 you got Sorensen saying ["]we're

6. Another outright misrepresentation to the Court is Respondents' statement that "the amendment making them Sherman Act defendants came after motions for directed verdict." Resp.Br. 16, n.11. The facts are that the amendment of the pleadings was allowed by order of June 24, 1986, 253a, while Respondents made motions for a directed verdict at the close of the evidence on July 11, 1986, nearly three weeks later. 272a.

> going to get an echo machine, Nanavati is going to suffer,["] you've got Komansky saying ["]that's when the guy from the hospital comes and says how about you and we get together and get an exclusive contract in echocardiograms.["] Is that evidence of combination, of agreement, of working together? Yes, I think so.

Tr. 7/14/86, p. 236.

Second, Respondents focus on the Komansky contract in isolation. Thus, while the Third Circuit did not analyze the contract under Section 1 at all, Respondents do not go much further. Specifically, they do not address the failure below to apply the doctrine of *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690 (1962), which requires consideration of the contract as evidence of the Hospital's participation in the boycott of Nanavati. In essence, the Hospital acted to deny him access to the opportunity of providing highly specialized cardiological interpretation to the Hospital's inpatients. See Petition, pp. 12-14. Instead, Respondents only address the contract standing alone.

Third, even Respondents' analysis of the evidence about the contract standing alone is misleadingly presented. For example, Respondents say "the trial record fails to support Nanavati's assertions" that the Hospital solicited Komansky to enter into an echocardiogram contract, rather than *vice versa.* Resp.Br., p. 4. Yet, Komansky's testimony belies their representation to this Court (4264a):

> Q And then you said somebody came back to you, the hospital approached you concerning setting up both the stress and the echo; is that correct?
>
> A Correct.

Nor is this a case where Nanavati claims that a change of exclusive contractors occurred which would constitute an antitrust violation. Cf. Resp.Br. p. 16.

Fourth, Respondents question whether there was injury to competition by a contract which required every echocardiogram performed in the Hospital to be professionally inter-

preted by a non-cardiologist. Since neither Nanavati nor anyone else was afforded an opportunity to bid on such a contract or to provide the service on a competitive, non-exclusive basis at the only hospital in the entire county, an injury to competition is clear. The $200 super-competitive price charged by Komansky is evidence of this in light of Nanavati's price of $100.[7]

Finally, Respondents raise a strawman argument, discussing why the Komansky contract was not an unlawful tying agreement. Resp.Br. p. 17-19. Since Petitioner did not proceed on this tying theory, that discussion is entirely beside the point.

When the inaccuracies and irrelevancies of the Respondents' arguments are swept aside as they ought to be, it is evident that the opinion below failed to give Petitioner the full benefit of the evidence which the jury heard. The Petition should accordingly be granted to uphold the doctrine of *Continental Ore* and consistent with it, reinstate the jury's verdict.

4. The Entitlement to Nominal Damages Should be Addressed by the Court.

Respondents assert that the error below is "entirely personal" to Nanavati and "bereft of national import." Resp.Br., p. 20. Without citation to any authority, they assert that "no dispute exists that nominal damages are available to an antitrust plaintiff . . . ." *Id.* If that is indeed so, it is appropriate for the Court to so rule for the benefit of the national antitrust jurisprudence.

But Respondents claim that Nanavati failed to claim nominal damages below. Resp.Br., p. 19. He in fact requested damages and was awarded $350,000 by the jury, and he argued for them in the Court of Appeals. The issue of nominal damages did not arise until the appellate court affirmed the

7. While it is true that Nanavati's complete charge in his office for an echocardiogram on his own equipment was $400, that included items for which BTMH billed the patient separately for echocardiograms performed in the Hospital. These additional items included the costs of the expensive equipment, space, operating personnel, and the like.

finding of a Sherman Act Section 1 combination. That court ignored the evidence of the combination's impact on Nanavati even for the five days during which he was suspended from the Hospital before he obtained a temporary restraining order in state court. Thus, this Petition is the first meaningful opportunity for Nanavati to raise this defect in the opinion below.

The United States District Court for the Southern District of New York recently emphasized the importance of enforcing the Clayton Act's award of attorneys' fees and expenses even where only nominal damages have been recovered. In *United States Football League v. National Football League*, 1989-1 Trade Cas. (CCH) ¶ 68,407 (S.D. N.Y. 1989), the court awarded over $5 million in attorneys' fees following a vindication of the antitrust laws by a jury verdict of only $1 in nominal damages.

In these circumstances, the Petition should be granted to permit the Court to announce the proper role of nominal damages and a concomitant award of attorneys' fees in private civil antitrust cases.

CONCLUSION

The Brief in Opposition for Respondents fails to proffer any substantial basis to deny the Petition. To the contrary, for all the foregoing reasons and those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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